No. 08-____

IN THE

Supreme Court of the United States

MELVIN LEWIS BAYLOR,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether threatening a robbery victim with a firearm constitutes "physical" restraint of the victim requiring enhancement of a defendant's sentence under United States Sentencing Guidelines § 2B3.1(b)(4)(B) and related Guidelines provisions.

PARTIES TO THE PROCEEDING

The parties to the proceeding in the Court of Appeals for the Fourth Circuit were Petitioner Melvin Lewis Baylor and Respondent the United States.

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INTRODUCTION

The decision below merits this Court's review because it deepens an entrenched multi-Circuit conflict over an important and frequently-recurring issue of federal sentencing law: Whether a Sentencing Guidelines enhancement for "physical restraint" of a victim — an enhancement applicable to multiple criminal offenses — applies when (as is common) the only "restraint" is the mere brandishing or pointing of a gun.

The Fourth Circuit below held that the act of threatening a robbery victim with a gun satisfied the physical restraint enhancement of U.S.S.G. § 2B3.1(b)(4)(B). The court reasoned, agreeing with the Tenth and Eleventh Circuits, that restraint by pointing a gun at a victim constitutes "physical restraint" under the Guidelines. As the court recognized, this holding put it in conflict with multiple other Circuits: at least the Fifth, Second, Seventh, and D.C. Circuits hold that "pointing a gun at a victim to restrict his movement is not *physical* restraint." Pet. App. 4a (emphasis added). Under this view, the modifier "physical" means the Guideline "requires the defendant either to restrain the victim through bodily contact or to confine the victim in some way." *United States v. Drew*, 200 F.3d 871, 880 (D.C. Cir. 2000). The Ninth Circuit takes an intermediate approach, under which only limited forms of restraint at gunpoint can be deemed physical restraint.

This 4-3-1 split is deeply entrenched, and the issue in conflict is a recurring one that, according to

federal statistics, affects thousands of federal criminal cases each year. Moreover, the rule adopted by the court below — under which essentially any brandishing of a gun or other weapon would appear to establish "physical restraint" — threatens to make the physical restraint enhancement virtually automatic in *all* armed robberies, notwithstanding the existence of other provisions that specifically address the use of weapons and threats. Because the Guidelines determine the range of presumptively reasonable sentences, and the issue in conflict recurs so frequently, this Court's resolution of the conflict is urgently needed.

OPINION BELOW

The opinion of the court of appeals (Pet. App. 1a-5a) is unpublished. It is available at 2008 WL 4659859 (4th Cir. Oct. 21, 2008).

JURISDICTION

The court of appeals issued its decision on October 21, 2008. Jurisdiction in this Court exists under 28 U.S.C. § 1254(1).

PROVISION INVOLVED

Section 2B3.1(b)(4)(B) of the United States Sentencing Guidelines provides: "[I]f any person was physically restrained to facilitate commission of [a robbery] or to facilitate escape, increase [the base offense level] by 2 levels."

STATEMENT

Petitioner, Melvin Lewis Baylor, pled guilty to federal criminal charges arising out of the robbery of a shoe store by Petitioner and two accomplices.

During the course of the offense, one of Petitioner's accomplices ordered the store owner, at gun point, to hand him cash from the cash register and a paper bag located underneath the register. Shortly thereafter, the store owner drew a weapon and shot Petitioner (who was unarmed) and the accomplice. Petitioner pled guilty to conspiracy to commit robbery affecting interstate commerce and to actual commission of the robbery, in violation of 18 U.S.C. §§ 1951, 2; and to brandishing and discharging a firearm in furtherance of a crime of violence, in violation of 18 U.S.C. §§ 924(c), 2.

At sentencing, the district court enhanced Petitioner's United States Sentencing Guidelines offense level, over Petitioner's objection, pursuant to U.S.S.G. § 2B3.1(b)(4)(B), which adds two offense levels "if any person was physically restrained to facilitate commission of the offense or to facilitate escape." When this enhancement was added to the remaining sentencing factors, Petitioner was subject to an offense level of 17, a criminal history category of III, and a Sentencing Guidelines range of 30 to 37 months for the robbery offense. The district court sentenced Petitioner to 36 months in prison for the robbery, and to 10 years in prison for the firearm offense, to run consecutively. Absent the two-level physical restraint enhancement, Petitioner's sentencing range for the robbery would have been 24 to 30 months. *U.S. Sentencing Guidelines Manual* ch. 5, pt. A, sentencing table (2008). Thus, the enhancement added an additional six to 12 months to Petitioner's sentence.

Petitioner appealed his sentence, arguing that the enhancement did not apply and citing Ninth,

Second, and Fifth Circuit decisions holding that merely pointing a gun at a victim is not physical restraint under the Guidelines. The court of appeals affirmed.[1] The court noted that the Guidelines define "physically restrained" as "the forcible restraint of the victim such as by being tied, bound, or locked up," U.S.S.G. § 1B1.1 cmt. n.1(K) (2006) — and implicitly recognized that a victim merely threatened with a gun is not "tied, bound, or locked up" — but dismissed these examples as "illustrative only." Relying on prior Fourth Circuit precedent, the court rejected the views of the cited Circuits, holding that "in this Circuit the law is clear that use of a gun to restrain a victim may constitute physical restraint within the meaning of § 2B3.1." Pet. App. 4a.

REASONS FOR GRANTING THE WRIT

I. THERE IS A DEEPLY ENTRENCHED SPLIT ON THE QUESTION PRESENTED

The courts of appeals are deeply split over whether threatening a victim with a firearm constitutes "physical restraint" of a victim under the Sentencing Guidelines. The Fourth Circuit is one of three Circuits to hold that merely brandishing a weapon can constitute physical restraint; at least

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[1] The court of appeals noted that "[t]he appellate court must determine whether the district court correctly calculated the advisory guideline range, because a failure to do so constitutes a 'significant procedural error' that may render a sentence unreasonable." Pet. App. 3a (quoting *Gall v. United States*, 128 S.Ct. 586, 597 (2007)). The court added, "The appellate court (unlike the district court) may then apply a presumption of reasonableness to a sentence within the guidelines range." *Id.* (citing *United States v. Go*, 517 F.3d 216, 218 (4th Cir. 2008)).

four Circuits have held the contrary; and the Ninth Circuit takes an intermediate position.

The Fifth, Second, Seventh, and D.C. Circuits hold, in the words of the D.C. Circuit, that the modifier "physical" means that physical restraint "requires the defendant either to restrain the victim through bodily contact or to confine the victim in some way." *United States v. Drew*, 200 F.3d 871, 880 (D.C. Cir. 2000); *see United States v. Hickman*, 151 F.3d 446, 461 (5th Cir. 1998) (defendant's pointing a firearm at an employee "permitted no alternative but compliance," but did not constitute physical restraint); *United States v. Anglin*, 169 F.3d 154, 164 (2d Cir. 1999) ("[D]isplaying a gun and telling people to get down and not move, without more, is insufficient to trigger the 'physical restraint' enhancement," because otherwise "virtually every robbery would be subject to the . . . enhancement."); *United States v. Johnson*, 46 F.3d 636, 639 (7th Cir. 1995) ("To be eligible for the additional two-level enhancement for physical restraint the court had to find . . . something beyond pointing a gun and inflicting injury.").

In sharp contrast, the Tenth and Eleventh Circuits have agreed with the Fourth Circuit that merely issuing directions to a victim at gunpoint is sufficient to constitute physical restraint. *United States v. Pearson*, 211 F.3d 524, 527 (10th Cir. 2001) ("holding and pointing a gun" sufficient to apply enhancement"); *United States v. Jones*, 32 F.3d 1512, 1519 (11th Cir. 1994) (physical restraint existed when "the obvious presence of handguns ensured the victims' compliance").

Finally, the Ninth Circuit has taken an intermediate view, under which "something more" than merely pointing a gun — such as doing so for a sustained period at a particular victim — is required. *E.g., United States v. Parker*, 241 F.3d 1114, 1118 (9th Cir. 2001).

II. THE ISSUE PRESENTED IS ONE OF WIDESPREAD SIGNIFICANCE

Review by this Court is particularly needed because the issue in conflict potentially affects thousands of criminal sentences annually. For example, the Robbery guideline, § 2B3.1, was applied 3,271 times in Fiscal 2007.[2] Under the approach of the Fourth, Tenth, and Eleventh Circuits — which treats restraining a victim through the threatened use of a firearm (or presumably any other weapon) as satisfying § 2B3.1(b)(4)(B) — almost all of those robberies would qualify for the enhancement. As the Second Circuit has noted, only "a quixotic robber [would] display his gun, and then say to the tellers or bank customers, 'this is a holdup, but feel free to move about the bank'." *United States v. Anglin*, 169 F.3d at 165 (noting that if mere gunpoint coercion sufficed, "*virtually every robbery* would be subject to the 2-level enhancement for physical") (emphasis added).[3]

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[2] U.S. Sentencing Commission, *Use of Guidelines and Specific Offense Characteristics Fiscal Year 2007, available at* http://www.ussc.gov/gl_freq/07_glinexgline.pdf.

[3] Indeed, in more than half the instances in Fiscal 2007 subject to § 2B3.1, the defendant received a separate enhancement under § 2B3.1(b)(2) — which covers the use, brandishing or possession of a firearm or other weapon, or for threats of death. *See Use of Guidelines, supra.* In some additional set of cases, a

In addition, even aside from § 2B3.1, two other specific offense Guidelines provide for a physical restraint enhancement: Section 2B3.2(b)(5)(B), dealing with extortion, and § 2E2.1(b)(3)(B), involving the making or financing of an extortionate extension of credit. And § 3A1.3 provides a broadly available enhancement that applies whenever "a victim was physically restrained in the course of the offense." All of these provisions are affected by the conflict, as all are subject to the same definition of physical restraint contained in the commentary to U.S.S.G. § 1B1.1.

In short, the extraordinarily broad class of cases affected by the deep Circuit conflict at issue here calls for this Court's prompt review.

III. THE FOURTH CIRCUIT'S INTERPRETATION OF "PHYSICALLY RESTRAINED" IS ERRONEOUS

The plain text of the phrase "physically restrained" cannot be squared with the Fourth Circuit's interpretation. The Guidelines' Application Notes define "[p]hysically restrained" as "the forcible restraint of the victim such as by being tied, bound, or locked up." U.S.S.G. § 1B1.1 cmt. n.1(K) (2006). The use of the modifier "physical," and of these examples, "indicat[es] that physical restraint requires the defendant either to restrain the victim through bodily contact or to confine the victim in some way." *Drew*, 200 F.3d at 880. The mere act of

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§ 2B3.1(b)(2) enhancement was only inapplicable because the defendant's use of a firearm resulted in conviction for a separate offense, such as 18 U.S.C. § 924(c).

pointing a gun at a victim is simply not *physical* restraint.

To be sure, the phrase "such as" indicates that the examples in the Guidelines' definition are not exclusive, *see Pub. Employees Ret. Sys. of Ohio v. Betts*, 492 U.S. 158, 173 (1989), but all three share the characteristic of involving the application of corporeal force, i.e., all three fall within the ordinary meaning of "physical restraint." The well-known canon of construction *noscitur a sociis* dictates that any non-enumerated examples must share this characteristic.

Moreover, the adverb "physically" limits the forms of restraint that require application of the enhancement to those instances in which the defendant uses physical, rather than any other kind of force. *See United States v. Anglin*, 169 F.3d at 164.[4] Pointing a gun at a victim may constitute

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[4]

> '[R]estraint' is a condition capable of being brought about by a number of forces—physical, mental, moral, singly or in combination; consequently the susceptibility of individuals to restraint is not uniform. Precisely the same set of circumstances may restrain the timid (or prudent or moral) from action, while having no restraining effect upon the bold (or foolhardy or amoral). Clearly the Sentencing Commission intended a more precise concept; if § 2B3.1(b)(4)(B) said only that the enhancement would apply 'if any person was restrained,' the courts would become involved in mental, moral, philosophical, even theological considerations, in addition to physical ones.

United States v. Anglin, 169 F.3d 154, 164 (2d Cir. 1999).

mental restraint, but it is in no sense physical. Indeed, interpreting "physical restraint" to include pointing a gun at a victim comes perilously close to rendering the word "physical" surplusage, in violation of the courts' "duty to give effect, if possible, to every clause and word" of a provision. *Duncan v. Walker*, 533 U.S. 167, 174 (2001) (internal quotations omitted).

The inapplicability of the enhancement to the brandishing of a firearm is even clearer in the context of the Guidelines as a whole. This is because § 2B3.1 already contains a *separate* enhancement that unambiguously applies to the act of pointing a gun at a victim during a robbery. This enhancement, § 2B3.1(b)(2), applies to brandishing or possessing a firearm or other weapon, as well as to threats of death. It would make no sense to conclude that the Sentencing Commission intended the acts covered by § 2B3.1(b)(2) to be near-automatically subject to an additional enhancement for physical restraint.

Moreover, the Fourth Circuit's approach would lead to the oddity that "every armed robbery would be enhanced by the physical restraint provision," *United States v. Hickman*, 151 F.3d 446 (5th Cir. 1998), since armed robbery invariably carries with it a threat not to move. *See United States v. Doubet*, 969 F.2d 341 (7th Cir. 1992). For all of these reasons, merely pointing a gun at a robbery victim cannot be deemed to constitute "physical restraint" under the Guidelines.

CONCLUSION

For the reasons set forth above, the petition for certiorari should be granted.

Respectfully Submitted,

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January 21, 2009

APPENDIX

United States Court of Appeals, Fourth Circuit.

UNITED STATES of America, Plaintiff-Appellee,

v.

Melvin Lewis BAYLOR, Defendant-Appellant.

No. 08-4098.

Submitted Sept. 30, 2008.

Decided Oct. 21, 2008.

Before WILKINSON, TRAXLER, and DUNCAN, Circuit Judges.

Affirmed by unpublished PER CURIAM opinion.

Unpublished opinions are not binding precedent in this circuit. PER CURIAM:

Melvin Lewis Baylor pled guilty to conspiracy to commit robbery affecting interstate commerce, 18 U.S.C. § 1951(a) (2000) (Count One); aiding and abetting a robbery affecting interstate commerce, 18 U.S.C. §§ 1951, 2 (2000) (Count Two); and brandishing and discharging a firearm in furtherance of a crime of violence, 18 U.S.C.A. § 924(c) (West 2000 & Supp.2008) (Count Three). He received a sentence of thirty-six months imprisonment for Counts One and Two, and a consecutive ten-year sentence for the § 924(c) count. Baylor appeals his sentence, contending that the district court erred in applying a two-level enhancement for physical restraint, *U.S. Sentencing Guidelines Manual* (USSG) § 2B3.1 (b)(4)(B) (2006). We affirm.

Baylor, Trisco McFarland, and Nathan Cuthbertson together robbed a shoe store in Charlotte, North Carolina. Cuthbertson and McFarland both carried firearms. McFarland went to the back of the store and robbed two customers while Baylor and Cuthbertson went up to the store manager, Shawn Miller, who was at the cash register. Miller was also armed, but concealed his pistol under his shirt. Cuthbertson put his gun at the back of Miller's head and told Miller to open the cash drawer. He told Miller to hand him a paper bag that was on the shelf below the cash drawer, and then Cuthbertson handed the bag to Baylor, who put money into it.

While Cuthbertson was distracted, Miller drew his gun and shot both Cuthbertson and Baylor multiple times. Cuthbertson was fatally wounded, but McFarland and Baylor escaped and stole a car at gunpoint from two men who had just parked in the parking lot.

Before sentencing, Baylor objected unsuccessfully to the enhancement recommended in the presentence report for restraint of a victim, arguing that Miller was not restrained in a way that would trigger the enhancement under § 2B3.1 (b)(4)(B). The district court found that the enhancement was warranted under *United States v. Wilson,* 198 F.3d 467 (4th Cir. 1999) (holding that victim was physically restrained when gun was placed to her head). The court granted the government's motion for a substantial assistance departure and imposed a sentence of thirty-six months imprisonment for Counts One and Two, and a mandatory consecutive sentence of ten years for the § 924(c) count, for a total sentence of 156 months.

Baylor appeals his sentence, contending that the sentence is procedurally unreasonable because the court incorrectly applied the enhancement for physical restraint. A sentence is reviewed for reasonableness, applying an abuse of discretion standard. *Gall v. United States,* --- U.S. ----, ----, 128 S.Ct. 586, 597, 169 L.Ed.2d 445 (2007); *see also United States v. Go,* 517 F.3d 216, 218 (4th Cir.2008). The appellate court must determine whether the district court correctly calculated the advisory guideline range, because a failure to do so constitutes a "significant procedural error" that may render a sentence unreasonable. *Gall,* 128 S.Ct. at 597. The appellate court (unlike the district court) may then apply a presumption of reasonableness to a sentence within the guideline range. *Go,* 517 F.3d at 218;*see also Gall,* 128 S.Ct. at 597; *Rita v. United States,* --- U.S. ----, 127 S.Ct. 2456, 168 L.Ed.2d 203 (2007).

Application Note 1 to § 2B3.1 defines "physically restrained" by adopting the definition of the term set out in Application Note 1(K) to USSG § 1B1.1, that is "the forcible restraint of the victim such as by being tied, bound, or locked up."* The examples given in the Note are illustrative only. *See United States v. Johnson,* 492 F.3d 254, 257 (4th Cir. 2007) (citing *United States v. Stokley,* 881 F.2d 114, 116 (4th Cir. 1989), and noting with approval the decision in *Wilson* that "holding a gun to a victim's head to prevent her from leaving her carjacked

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* The same definition is incorporated into USSG § 3A1.3, which provides a two-level adjustment for restraint of a victim where the applicable guideline does not have an enhancement for that conduct.

vehicle" was "sufficiently akin to the examples to constitute forcible restraint").

Baylor contends that in his case the enhancement was error based on decisions from the Ninth, Second, and Fifth Circuits holding that pointing a gun at a victim to restrict his movement is not physical restraint. *See United States v. Parker,* 241 F.3d 1114, 1118-19 (9th Cir. 2001); *United States v. Anglin,* 169 F.3d 154, 164 (2d Cir. 1999); *United States v. Hickman,* 151 F.3d 446, 461 (5th Cir. 1998). However, the First Circuit recently held that pointing a gun at a victim, while simultaneously placing a hand on his neck and shoulder to force him to kneel and stating, "I do not want to hurt you," constituted physical restraint. *United States v. Ossai,* 485 F.3d 25, 33 (1st Cir.), *cert. denied,* --- U.S. ----, 128 S.Ct. 279, 169 L.Ed.2d 204 (2007).

Regardless of how other circuits view the issue, in this Circuit the law is clear that use of a gun to restrain a victim may constitute physical restraint within the meaning of § 2B3.1. Because our precedents are controlling, the district court did not err in finding that the victim in this case was physically restrained when Baylor's co-defendant placed a gun at his neck.

Baylor suggests that the holding in *Parker* should be applied in his case. However, a panel of this court may not overrule a prior panel. *United States v. Simms,* 441 F.3d 313, 318 (4th Cir.), *cert. denied,* 549 U.S. 905, 127 S.Ct. 233, 166 L.Ed.2d 184 (2006). He also suggests that our decision in *United States v. Mikalajunas,* 936 F.2d 153 (4th Cir. 1991), is more applicable to his case than *Johnson,* because *Johnson* involved an obvious example of physical restraint. In *Mikalajunas,* the defendant was

convicted of being an accessory after the fact to second degree murder of a victim who was stabbed to death. We held that "a brief holding as part of a stabbing" did not meet the guideline definition of restraint. *Mikalajunas,* 936 F.2d at 156. In this case, we are satisfied that the facts support the enhancement.

We therefore affirm the sentence imposed by the district court. We dispense with oral argument because the facts and legal contentions are adequately presented in the materials before the court and argument would not aid the decisional process.

AFFIRMED